And there may be an affray which will not amount to a riot, though many persons be engaged in it; as if a number of persons, being met together at a fair or market, or on any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, it seems to be agreed that they will not be guilty of a riot, but only of a sudden affray, of which none are guilty but those who actually engaged in it; and this on the ground of the design of their meeting being innocent and lawful, and the subsequent breach of the peace happening unexpectedly without any previous intention. An affray differs also from a riot in this: that two persons only may be guilty of it. Whereas three persons at least are necessary to constitute a riot."

Now, if this definition had been written for this case, it could not have fitted better. A riot is where people come together to execute a foregone intent condemned by the law. An affray is where people assemble together on a lawful occasion, and a disturbance arises out of sudden heat and provocation. Now, then, was this a riot or an affray? Gentlemen, it is a principle of the criminal law, that I am afraid my worthy friend, the Prosecuting Attorney has altogether forgotten in the zeal he manifests to obtain a conviction; but it is a principle as old as the law itself, commended to us by the highest authority, enforced in the country from whence we sprang and from whose institutions we derive our law, existing there at this day unimpaired in all its force, and a principle which is existing here, and is part of the law, that is, that in criminal cases the accused is entitled to the benefit of every rational doubt. The prosecution can never ask a conviction in a criminal case, till he makes clear the guilt of the party accused, free from all reasonable doubt; and if the result of the testimony on both sides, or on one side, is to leave the scales of probability on a balance; to excite a doubt, or stop short of certain proof, the conclusion from the testimony most favorable to the accused, is the conclusion that the jury is bound to draw. Here it is unquestioned that there is abundant proof to show, that the fight in the morning at these polls sprung from the challenge of the one Irishman, and the production of a knife or dirk by the other. The gage was thrown down and taken up. The fight sprung from that, the parties being at a public place, at the polls, voting, where it was lawful for them to be. I say, then, that no impartial mind can look at this evidence and not see that there is at least a probability that such was the origin of the difficulty. The censorious mind, biased by party feelings, party prejudices, party hatred—for it has come to this, that men of opposing parties now hate each other; lamentable as it is, the evidence of this has been too manifest in the testimony drawn from your witness-box during this trial. I say, a man prejudiced by party or blinded by hate and rancorous feeling, may shut the eyes to all that appears on one side of this case favorable to the defence, and looking exclusively to the testimony on the other side, conclude that there is proof of a riot and not of an affray. I do not say how an impartial and intelligent mind is necessarily to judge or determine whether the probabilities preponderate on the one side or the other; what I say is, and I maintain it confidently, that every impartial and intelligent mind must see and admit that there are probabilities on both sides.

Now, my proposition is, that though in civil cases juries may weigh probabilities, and decide according as they preponderate, that is not allowed in criminal cases; there, certainty is required. It will not do to hang a man because he is probably guilty of murder, or to put a man in the penitentiary because probably he is guilty of stealing, nor to exhaust a man's pecuniary substance by fine because he probably committed a riot; nor if there be a probability that he committed an affray can you convict him of a riot. You cannot act on probabilities in a criminal case; and it results from that benignant principle of the law to which I have already adverted, which declares that it is better that ninety-nine guilty men should escape than that one innocent man should suffer. It is that principle of law which commands juries who sit in criminal cases to resolve every doubt, I mean rational doubt, arising on the testimony, in favor of the accused. If you are a political jury, and are trying this case by party tests, it being proved that these defendants are Americans, or Natives, or Know-Nothings, or whatever else you may call them, you may find them guilty; but if you are jurors with the intelligence which belongs to your office, jurymen impartial, fair, and just, I submit it to your honor, I submit it to your justice, when you bring your minds to the consideration of the proof regarding the morning affair, according to the principles I have explained to you, and which cannot be controverted; whether, upon this evidence, you can, upon your consciences, find any of these parties guilty of a riot, when, according to all reasonable probabilities, it amounted to nothing more than to an affray.

Gentlemen of the Jury, I shall proceed now to call your attention to those parts of the case which concern the disturbances which occurred after the military were brought upon the ground.

The indictment is a general one, and of course gave no notice to the parties accused of the precise offence for which they were to be tried. They learned that for the first time, from the witnesses who were examined in court. It is a general charge of a riot and a disturbance of the peace. I have attempted to explain to you, and I trust successfully, that under this indictment which charges one offence, it is not competent for the United States to inquire into, or prove, or submit to your consideration any other offence; and that whilst a latitude of choice is permitted amongst various offences, whenever the prosecution makes its selection, and it does that by the first witness he calls to the stand; whenever he makes an election to prove against the party charged a special offence, he is confined afterwards to that, and he is not at liberty to go into an investigation of any other offence, having no connection with the first; so that if I be right in that proposition of law, and if it be contested, you may call upon his Honor to pass upon the question. I say if I be right in that proposition of law, unless some connection is established by the evidence between the morning disturbance, and that which occurred upon the marching of the Marines, as he first undertook to give evidence of the morning affray, he selected that as his case for prosecution, and it was transcending the legitimate privileges of the prosecution to go further and enquire into those other matters of subsequent occurrence. It may be said that the counsel for the defence, if this was the law, might have interposed and arrested the examination of witnesses, and made the point to the court. My answer is, that we had no right to suppose that a gentleman of experience and learning who has so long exercised the office of prosecutor in this court, would have attempted in a case like this, to urge against these parties considerations that did not properly belong to the case—and until the case of the United States was through—till he declared it ended on his part, we had a right to expect that he would introduce some evidence to show a connection between the various disturbances, about which he had made his witnesses testify. It was not for us, gentlemen, after he had introduced that evidence to seek to skulk from that enquiry. After the United States had given evidence on its part of the occurrence in the afternoon, and sought to make its impression of the bloody tragedy that marked that day, it was not for the defendants, or those who represent them, to seek an avoidance of a full investigation. It was their duty to meet it, and to answer the allegations and aspersions, to protect themselves against the consequences of what was alleged against them, and if possible, fix the crime at the door of its responsible authors. His Honor has said, in the course of some discussion on a question of evidence, that a stranger coming in court might suppose that the city authorities were on trial here. How a fair and impartial examination can be made into the occurrences of the afternoon of the 1st of June, without putting the city authorities on trial passes my comprehension to understand. A homicide was committed. It was felonious or not. If it was felonious, a crime was perpetrated. If a crime was perpetrated, there was a criminal that did it; and it is impossible to investigate the history of that transaction without developing evidence enough to show who were the parties who perpetrated the crime. But what connection, gentlemen, has the disturbance of the morning with the disturbance in the afternoon? I do not know whether I understood my learned friend rightly. I do not know that I understood him to maintain that there is any proof exhibiting a connection between these two disturbances; yet it is only upon the hypothesis that there was such connection—that there was any color of authority to lug the occurrences of the second transaction into this case as a legitimate subject of enquiry. I have stated to you, gentlemen, that the affray in the morning was directed to one purpose, and was participated in by one set of persons; that the affray in the afternoon was directed to quite another purpose, and conducted by a different set of persons. The evidence probably implicated some of these parties in each, but not all of them. Now, the purpose of the morning affray was, if you please, to break that column of Irish voters, to interfere with their right to vote, to disturb the election; but what connection had it with the affray in the afternoon? The Irish were not there mustered up again to vote; Capt. Tyler did not bring his Marines up under arms to vote. They had all voted perhaps at the Navy Yard. So then the parties to the afternoon affray were entirely different from the parties to the forenoon affray. It originated out of another matter—that is conceded. The afternoon affray originated out of the marching of the Marines from the barracks. It was participated in by persons from the Navy Yard, described as boys and young men of one or two and twenty, eight, ten, or a dozen in number, at the farthest. It had its origin at the Navy Yard, and not at the first precinct of the Fourth Ward. Its cause was the marching of the Marines—because the proof is that, as soon as it was known at the Navy Yard that the Marines were going to interfere at the election, these boys got out this old swivel, unloaded as it was, lame of a wheel, as it proved to be, and dragging it after the Marines, trailed it to the Fourth Ward; I say then that the appearance of the Marines at the place of voting in the Fourth Ward, was the first intimation there of the disturbance. It is impossible therefore for any connection to have existed between the morning shindy and this trouble with the swivel. The first, if you please, was with the Plug Uglies from Baltimore, and their associates here, armed against the Irish while voting; the second was by the boys from the Navy Yard, armed against the Irish Marine corps. They had different purposes; they were directed against different persons; they occurred at different times, and there could have been no connection between them. They were as disconnected as if one had occurred, to-day, and the other yesterday. Not a "Plug Ugly" was on the ground. If there was a riot then about the swivel, it was altogether different from the affray in the morning. I think this must be conceded; nay, I understood his Honor, Judge Crawford, to take that view of this case in his decision on the instructions. Can it be insisted, then, that there was any connection between these two affrays? What, then, did the learned District Attorney of the United States mean when he asserted that those polls were under duress, and in possession of the mob throughout the entire day? Where do you find the evidence? He said it was proved that a tomahawk or something like one, a savage sort of weapon, was stuck up by some Plug Ugly, and that a threat was made that no damned Irishman should vote. The Plug Uglies then had possession of the polls. How long did it remain? The man who stuck it in the fence made his remark, sat down under it, and according to the most exaggerated account, left in five minutes, and yet, my learned friend adverted to that fact as proof pregnant to show that these parties had possession of the polls all that day. The tomahawk was stuck in the fence and allowed to remain five minutes, and then taken away, and that is proof that the riot continued there till one o'clock according to the gentleman. By what process of ratiocination, or system of logic he arrives at his conclusion passes my comprehension. But he says that the poll books prove that this state of things continued. Now, by an apppeal to the poll book, which we brought into this case, we ascertain that a certain number of votes were cast prior to the arrival of the Marines, which were equal to the number of minutes in the time which intervened from the reopening of the polls to the arrival of the Marines.

Mr. BRADLEY. More.

Mr. ELLIS. One and one-third a minute.

Mr. SCOTT. My associates tell me that the number of votes exceeds the number of minutes in that duration of time, and among them, the gentleman concedes, are to be found many names peculiar to other lands, indicating that the voters were from foreign parts, and yet my learned friend, with that poll book in his hand, pregnant with this truth, gets up and argues to this jury that the poll book shows that that rioting continued from morning till noon, and that, during the whole day, the Plug Uglies had possession of the polls. I beg my friend to remember that he is conducting a criminal prosecution, where justice and fair play, if not liberality, are expected. He says, that he comes to his conclusion because he understood it was proved that more than a hundred Irishmen were driven from the polls in the morning, and he does not see a hundred Irish votes on that poll afterwards. Now, let us test the gentleman's logic. The Irish were frightened and driven away; the poll book shows that only a part of them returned; a part kept away, and therefore, yes, therefore, the gentleman argues because this party kept away the riot continued. Now, sir, I think this is a most extraordinary course of reasoning. It might be that the riot terminated, and that those parties acting upon their apprehension did not to choose return. They were afraid, and did not choose to expose themselves to the chance of danger afterwards. Order was restored, the peace was kept, quiet prevailed, and they could have voted in security, if they had desired to do so, but their fears kept them away, and for that reason, their names do not appear on the poll book. Is it evidence of a continuation of this riot that their names are not there? I say, surely my friend on the other side must have forgotten that he is prosecuting these parties criminally, or he would not have indulged in an argument so strange as this, and so false in its conclusions. He said Mr. Donn proved that there were disturbances from time to time during that day. Suppose there were—sporadic cases—but does it prove that there was an epidemic. Concede that there was an affray in the morning; does every disturbance during the day make the continuation of a riot? It strikes me as a little absurd. But he says—justice-policeman Donn said he saw many cases of Irishmen driven away. Now, Mr. Donn was not the only person at the polls. He was not the only one who had eyes to see, and ears to ear. The commissioners were there, and we examined them. Other persons were there, and we have examined many of them, and save the single case of one Irishman who attempted to vote on false papers, during the entire period which elapsed from the morning affray until the appearance of the Marines, there was not, about that precinct, one case of disturbance at the polls. We disprove the testimony of Donn, by bystanders. We disprove it by the testimony of the commissioners, and much as the United States may choose to denounce and condemn them for their act in closing the polls, about which I shall presently have to say something, he has not undertaken to assail their character for truth and veracity. Two of them were of the American party; the other was an Englishman, and I believe it is not usual for the commissioners to belong to the same party. Of that, the jury are able to judge. But whether they be Englishmen or Americans, native or democrat, we have the concurrent testimony of the three commissioners to contradict Donn. It is not true that those disturbances continued all day. If they did continue in the manner described by Donn, they do not constitute a continuous rioting. I must confess I was not prepossessed with the manner of that witness in giving his testimony. He looked to me as if he once belonged to the Know-Nothings. His was the zeal and acting of a new recruit. Take his conduct as detailed by himself. One renegade is worse than ten Turks. There was no connection, gentlemen of the jury, between those two cases. I have the authority, and it is pretty strong authority, of the court, on which I will comment when I come to his Honor's decision on the instructions. But if there were a connection, can we be convicted of a riot; and that brings up the more immediate subject of the bloody tragedy on the 1st of June. It becomes my duty as counsel for the accused, to examine into the origin of that disturbance, as I attempted to examine into the morning affray, trace it from its origin, and point out the parties that are responsible for it. This I mean to do without fear, or any expectation of favor.

Between nine and ten o'clock of the morning of the first of June, this affray occurred at the first precinct of the Fourth Ward, in the manner that I have explained. Information of it was carried to the Mayor of your city. After some delay, the Mayor, in an open barouche, accompanied by Mills, the captain of the Auxiliary Guard, and by Goddard, the witness who has already figured in the case, drives to the scene of the disturbance. He does not descend from the barouche, nor does Goddard. According to his own account, he spoke to Mr. Wheeler, the father of the Tax Collector. He spoke to no one else; he commands no peace; he cautions no disturber of the peace; he sets up no authority; but sits quietly and peaceably in his barouche, where he is left undisturbed with his associates. The Commissioners made no complaint to him; he made no enquiry of them; but he puts out the Captain of the Auxiliary Guard, and in company with Goddard drives off to the Navy Department. The Captain of the Auxiliary Guard, I say, was left upon the ground, but we do not hear that he was called upon to quell any riot, or that any disturbance occurred. No, and they have not dared to put that man on the stand. If there was a riot or a disturbance there, Captain Mills must have seen it. He was a city officer, brought there by the Mayor, left there by the Mayor, obliged to see a disturbance, if disturbance there was, and this prosecution has not ventured to call him to the stand. Now, gentlemen, what was the condition of things about these polls at the time of the Mayor's advent. Was there rioting there? If there was, he ought to have commanded peace. Were there disturbers of the peace there? If there were, he ought to have had them arrested, or to make the attempt, at any rate—certainly to have given a caution and to have commanded peace; but he did none of these things, and for the best of all reasons, as the proof shows there was no disturbance of the peace. He says that the voting had not been resumed. Now, I do not mean to charge that your Mayor swore falsely; but I do mean to say, if we are to respect human testimony upon a contested matter of fact, it is proved in this case that whilst the Mayor was sitting in his barouche, the polls were open and the voting going on. The name of the witness to that fact is legion, and if human testimony can establish a disputed fact, the testimony in this case does show, that at the time of the Mayor's visit to that place the polls were open, the voting going on, and there was no riot and no disturbance of the peace. There has not been one witness, though a drag-net has been cast over this city, who has been found to testify, that whilst the Mayor was present, there was any disturbance or breach of the peace, save only the Mayor himself.

The Mayor, it will be remembered, never descended from his barouche; but if a party was violating the peace, why were not the police in the execution of their duty; why was not a warning spoken; why was not the peace proclaimed? It is vain and idle, it seems to me, to pretend that an intelligent tribunal, in the face of this mountain of proof, these facts piled up in this case, can believe the Mayor's statement. True or false, that was just after the morning shindy. It is proved that the Baltimoreans had left the ground. I believe they were needed for a riot at that time in the Seventh Ward, for the District Attorney has some other indictments on his docket. I suppose when they come to be tried, my friend will prove that these visitors from Baltimore were rioting at the Second Ward: whilst here he is attempting to prove they were rioting at the Fourth Ward; and whatever he may attempt, God knows he can get witnesses here to prove anything. But, I repeat, that for the purposes of this case, for its fair consideration and its just decision, we have established what was the condition of things when the Mayor came to the polls: the "Plugs" were absent. Nay, the Mayor proves it himself, because he said, as he drove up the avenue in the exercise of his duty, which required him to look to the condition of the city, all the time streaking it to the Navy Department, he met a party of rowdies who hurraed on their way to the other polls. Now, I apprehend they were the "Plugs:" so that the Mayor himself discloses that important fact, though he does not say that they were. According to every probability, the party engaged in the morning shindy had left the ground, and that is in accordance with all the testimony.

He had no reason for his excursion, but he drove up the city on official business. "What did you go for?" "On official business." "To see what was the condition of the highways of the city, and to visit the western part of the city on official business." Now we know what his official business was as well as he did himself. We all knew he was running to the Navy Department to have the Marines called out. Was there a reason for it; was there a cause for it—a reason sanctioned by law, or a cause that the law respects? The military may be called out, but it must be in extreme cases. That is the law of England, where military law prevails to a greater extent than I hope to see it prevail here. To quell riots, to quiet affrays, to disperse unlawful assemblages, and to keep the peace, is the appropriate duty of the civil authority. In England it is so. You have heard the law as it has been expounded, gentlemen, already by the learned judges of England, in some of the cases quoted in the arguments on the law points. In this country it is so. These duties pertain to the civil authorities. The military may be called on in England lawfully where there is just cause; it may be called on here lawfully where there is cause for it; but it can only be legitimately used when the civil authority is overpowered, or is unable from weakness, to quell the disturbance. That I understand to be our law as well as the law of England. I understand it to be the law laid down in the instructions, as explained by his Honor, to which I will call your attention hereafter.

Now, was there cause for it in this case? What was the pretext? What was the condition of things at the polls of the first precint of the Fourth Ward? What was the condition of things appearing there on the Mayor's visit? Gentlemen, need I argue this question to you? Is it not almost an insult to your understanding to argue the question to you, to tell you that there is no proof that there was such a disturbance or breach of the peace or riot at the first precinct of the Fourth Ward when the Mayor visited it that could not be quelled by the civil authorities? But he made his visit to the Navy Department and thence to the President's mansion: he made his representations there verbally: he was required to put them in writing: he came back to his office at the City Hall: he had an affidavit prepared for Mr. Goddard and administered to him the oath himself. It was sworn to before Mayor Magruder. He then indicts a letter to the President. Now, gentlemen, you will perceive that a good deal of time must have elapsed. He had to go first to the scene of disturbance, thence to the Navy Department, thence to the Executive mansion; he had to have his conversation with the Secretary of the Navy, and his conversation with the President of the United States, and they had to have their consultation. It had to be determined upon what authority an order should be granted; and when all these things had been discussed, understood, and decided, the Mayor came back to his office here at the City Hall. I suppose he had Mr. Goddard always at hand—his affidavit man—or else he would have to hunt him up. I do not know how that was. But the affidavit had to be written and sworn to, and a long epistle to the President had to be written and copied. Time was taken to do all these things; how much time could not exactly be ascertained, because his Honor ruled out the testimony which we thought would tend to fix the time. I have to argue, then, from circumstances to get at the time, and I think I have fixed circumstances enough to show you that the time was considerable, not less than two hours. I believe the order was got to the Navy-yard at half past twelve o'clock. An hour and a half or two hours were consumed. Mr. Lenox could have enlightened us upon this subject, so that we should not have been left to speculate upon it. An hour and a half or two hours, then, were consumed before the order for the Marines was obtained.

Now, if the polls were not closed in the morning, and the contrary is in proof, were they closed when he wrote his letter to the President, and Goddard swore to his affidavit? Was rioting going on then? Will the District Attorney argue that rioting was going on then? Is it to protect these parties from the visitation of the consequences of this act that the zeal of my friend, the District Attorney, was so much excited that he attempted to show, that it was going on when the voting was proceeding at the rate of more than a man to a minute.

I say again, if human testimony is to be respected; if it can prove anything, and establish any fact, the testimony in this case has established that when this affidavit was sworn to, and this communication to the President was written, much more when they were delivered, that there was no such state of things as they set forth, prevailing at all. A jury of Democrats of the rankest kind would be obliged to find that fact.

There was no rioting then, but men were voting at that precinct, and their votes were being received at the rate of more than a man to a minute. Yet the affidavit was sent to the Executive Department, and the communication was delivered to the President of the United States by the hands of this city officer. His Honor has decided, and we accept the decision, as the law of this case, that that affidavit and that written request justified the President, in point of law, (and that is all that his Honor could decide,) in ordering out the marines. Unquestionably, the President was imposed upon and deceived. If he had known the true state of things, surely he would not have given the order; and if he had known the true state of things, his Honor would not have decided that he had the lawful authority; but, in the opinion of the court, he is protected from the legal responsibility, by the fact that he was not bound to investigate the truth of this matter personally, and had a right to act upon the testimony before him. I am not here to question the correctness of that decision, but I must be permitted to say, seeing that the riot was alleged to be almost at his own door in the city, where he had his Marshall at hand—seeing the time that elapsed between the original application and the period at which the order was consummated, in the exercise of a sound discretion, he or his Secretary might have enquired into the state of things then existing, or might have sent for the Marshall, who is properly an executive officer under his control. None would doubt the willingness of the Marshall to obey the man from whom he holds his commission. He might have sent for the Marshall and desired to know from him if, with his *posse*, he could not put down this disturbance, which seemed to give the Mayor so much trouble; but he did not do it. The court says he was not bound to do it, and, therefore, there is no legal complaint against him for not doing it; and yet, as a free citizen of this country, I, like others, may entertain my own opinions, and regret that it had not occurred to one or the other of these Executive Officers to discharge the simple duty of making an enquiry as to the truth of these allegations of a riot. Certain it is the statement was untrue, and there was not a man in the city of Washington who would not have informed him it was untrue, if called upon. Certainly, his Marshall would have informed him it was untrue, if he had been called upon. Something was said about Young Hickory and Old Hickory—about the first and the second Jackson.

A riot far transcending this, occurred here during Old Hickory's time, and a precipitate Mayor ran to him to call out the military. "Where is the Marshall," enquired General Jackson. "Go and tell the Marshall I will hold him responsible for the peace of this city." There spoke Old Hickory, and there spoke a man of ability; experienced in war, with the knowledge of its horrors, who knew what it was to turn loose upon an excited, perhaps an unarmed people, the hireling soldiery with arms in their hands. I say thus spoke Old Hickory. Unfortunately, thus did not speak Young Hickory; for had Young Hickory spoken as Old Hickory did, the slaughter of your fellow-citizens would have been avoided; crime would have been prevented; the blood of slaughtered citizens would not have been dripping from the hands of the murderers, who have been called to testify in this case. The President is justified by the law, though, in issuing the order. He can plead in his excuse Goddard's affidavit and the Mayor's letter. That is the decision. But, if he had the right, upon this representation, to order out this military force, and is not responsible for the imposition upon him, can the same be said of the city officials who practiced the imposition? Did they practice an imposition? You heard Goddard's affidavit read. You have heard the Mayor's letter read. I do not know that I will consume your time by reading them again, but I will state what you will verify when this case is entrusted to you, that both the affidavit and the certificate spoke of affairs as they were alleged to have existed at the time of their preparation. They both represent, that, at the time of their preparation, the polls of the first precinct of the Fourth ward were in possession of rioters; that the commissioners were driven away from them; that the law was defied, and by persons in such strong force, that it was impossible for the city authorities to quell them. They stated those facts. Now, every man on the jury knows that they are false. I do not care who he is; every man within the sound of my voice knows that the statement is false. Now, if the President and the Secretary of the Navy can plead the imposition as a defence against their legal responsibility so far as they are concerned, can the city officials, who practised the imposition, escape its consequences? His Honor says, for example, that the Mayor of this city, who is a peace officer, had the right to make the requisition on the military arm of the government, and to use it at his discretion in a proper case; that as a matter of course, it was a discretionary power; he was the judge of the occasion; to exercise the power or to refrain from its exercise. Certainly, the power existed. It was in the discretion of the officer to resort to it or not, and that I understood the learned judge to declare in his instructions; but it does not follow because this was a discretionary power, that the Mayor is not responsible for his action.

The DISTRICT ATTORNEY. I do not understand the instructions of the court as you do.

Mr. SCOTT. I cannot see how they can be understood any other way. Is it to be believed that the Mayor, because he has the discretion to call out the military, is not responsible in law for the exercise of that discretion. That is much beyond what any other judge would go, and much beyond what this judge has gone.

The DISTRICT ATTORNEY. I merely interrupted the gentleman, to state the fact in this case. Your Honor has told the jury that with the necessity which induced the Mayor to make application for the Marines, this jury has nothing to do, except in one particular, and that is, if they believed that the Marines made an assault upon the rioters; and on that point, I have spoken before.

The JUDGE. The terms of the decision on the instructions, are these:

"Although the act of the Executive in this case was authorized by law, and required by duty, and the Mayor was using a discretionary power when he applied for military aid—the single fact that he, and he alone, and every officer similarly situated, must decide when the proper time has arrived to make such an application, shows that he applies at his discretion; still the inferior officer must, in the first instance, resort to the civil power, (and sometimes it may be material to know if he has done so,) but if it be too weak to suppress a riot, or if it will not aid to do so, or if the riot or disturbance be so great, so violent, so dangerous, that it must be apparent that any attempt at quelling it by civil officers would be futile, that such an attempt must be unsuccessful, and would be followed by the scoffing and derision of those who attempted it, and by increased tumult—then I think resort may be had at once to stronger means, without full or further recourse to the civil power.

"If you should believe, from the evidence you have heard, that the Marines made the first attack on the alleged rioters, and that, whatever of violent and turbulent conduct and acts proceeded from the defendants, or any of them, or others, connected with them, were resorted to in resistance to such attack, then it will be your duty (in enquiring whether the defendants were guilty of a riot at this particular time, or hour of the day, for you will recollect the alleged rioting in the morning, if you believe the evidence on this branch of the case, was wholly unconnected with the Marines in any shape, except so far as it was the ground on which the Marines were brought out,) to ascertain whether any or all of the circumstances before recited existed, so as to authorize or justify the use of force, and this, with a view to the guilt or innocence of the *resistants*. But if you should believe from the evidence in the case that the Marines, after their arrival at the polls, where they were legally, without any offensive or violent act on their part, were first assailed in a violent and turbulent manner, to the terror of the people, according to previous concert, whether remote or immediate, by the defendants, or any of them, with or without connection with others not on trial, making not fewer than three assailants, for the purpose of dispersing the Marines against all opposition, then the defendants, or so many of them as thus assailed the Marines, would be guilty of a riot."

The DISTRICT ATTORNEY. That leaves it open, then.

Mr. SCOTT. I could not attribute to this intelligent court the decision that a petty corporation officer, though he was a peace officer, was not responsible to the law for the manner in which he exercised his power and discharged his duty. Why, I have a discretion how I shall talk to you, gentlemen of the jury, but I must exercise it upon my own responsibility. If I offend decency, if I offend the law, I may be punished for it. The Mayor had the right to get the military; he had a right to use them against those who were violating the peace. But suppose, instead of undertaking to arrest the party who was within his power, he had taken a platoon of marines and fired upon him and killed him. Here he was acting under his discretion; but if he killed the man would it not be murder, and would he not be responsible, therefore, in acting according to his discretion? The books contain a case in point. Justice Littledale, in summing up a case of this kind—I quote from 5 Carrington and Payne's English reports, in Rex *versus* Pinney, p. 561—uses this language: "Now, a person, whether a magistrate or a peace officer, who has the duty of suppressing a riot, is placed in a very difficult situation; for if, by his acts, he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act, he is liable to an indictment on information for neglect; he is therefore bound to hit the precise line of his duty."

This decision having been made, Mr. Justice J. Parke said, "I do not think it necessary to add anything," and Mr. Justice Taunton said, "nor do I." Both, therefore, concurred in the opinion.

It would be preposterous if, when a mayor got his military under a Presidential order, he was not responsible for the manner in which he used it. Why if that were so, he might go on these streets bayoneting and shooting wherever he found a man or an opposing party to him, and he could not be held responsible to the law for murder. The representation made to the President, I believe, was that not only were these parties rioting, but I believe it was represented, also, that twenty-one were killed or wounded. Where did he get his information of the twenty-one? Some two or three were wounded, perhaps. It is an exaggerated statement of what had occurred, and a false statement as to what had not occurred. He, however, got the Marines under that false evidence, and there is no escape from it. I say he got under that false pretext an order for the marching of the marine corps, who were at your Navy Yard, and not only that, but an order couched in most extraordinary terms, setting out in what manner this corps should be armed, leaving no discretion to the experienced officer who had charge of it, commanding them to rake up every man, even to the waiter, the cook, the boot-black, and every menial about the house, in uniform or out of uniform, and commanding that they be marched armed with ball cartridges. With this bloody order in his pocket and these ready tools to execute his behests, this city official marches to the ground. In the mean time, perfect peace, perfect quiet, perfect order, was prevailing there. With a single exception, of an affray with one Irishman, uninterrupted peace prevailed during the entire period after the morning affair.

When the Marines started from the barracks, a parcel of boys from the Navy Yard followed them with an unloaded swivel. The Marines turned off to report to the Mayor at this place, and the boys got ahead of them with their piece. On the ground in Seventh street they got powder and material, with which it is proved they charged it. But on getting on the ground they interfered with no one there; they made no riot; they caused no affray; and the voting went on. They took their station along the Market House, and so little attention did they attract, that I think one or more than one witness who passed on the opposite side of the street, came to the place of voting without noticing them. They were under the shelter of the Market House—a parcel of boys with a swivel. My friend, Mr. KEY, asked why the Commissioners did not complain of the presence of those boys. He might have answered his own question. If he had put on a pair of cromatic glasses, by which he could have seen them in a proper light, he could have answered that they did not complain because the boys did not annoy them; they betook themselves to another place; they assaulted no one; they committed no disturbance; the voting went on; and that is the reason they did not complain. They had no cause to complain. Then the Marines took up their line of march, and the Mayor conducted them to the corner of Seventh and I streets, where they were drawn up in line. The Mayor proceeds in advance of them to the polls, and he tells us that he found the polls closed; that he knocked at the window, but received no reply. He was informed that the Commissioners had absented themselves. He also tells us that he was received with derision and scoffing, and his attempts to address the crowd were unavailing. Well, suppose they derided the Mayor—suppose the persons about there scoffed at him—does that make a riot? Suppose George Wilson and William Wilson both said that the Commissioners had closed the polls, and that they should not be opened until the military were taken away, would that make a riot? They did nothing to resist the Mayor. What they said was expressive of their own feeling, their indignant feeling, I think justly indignant feeling, at the presence of the military. Did that constitute a riot? Why, the Commissioners were not there to respond to the Mayor. If Mr. KEY could make a riot out of it, he must show that the Commissioners were there to be acted upon by what the Mayor said, to have their conduct influenced, because unless it was so it could not be said that these remarks were obstructing the Mayor. But the Commissioners were absent; they were not present to hear the Mayor, and they were inaccessible to his appeals. Because George and William Wilson said the polls should not be opened, Mr. KEY says they are guilty of a riot, by obstructing the Mayor in having them opened, when the Mayor tells you that he had no power to open them. Now, that is a curious sort of a riot. It was a riot in which there was nothing riotous said or done. Can you charge us with that riot? And was it not distinct from the morning riot? Had it any connection with the morning riot that was directed against the Irish legion—the unenlisted legion? This was directed in opposition to the Mayor in his attempts to have the polls opened. There is no connection at all, for as long as the polls were closed, no man could vote, Native, Whig, Democrat, or Know-Nothing. If it was a riot, he could not allege it here, for he has not charged it against us. But, he says, this was not only a riot on the part of George Wilson, who was standing up on an elevated platform where he could really take no part in the affair, where he was expending his force upon the free air; it was not only a riot on the part of George and William Wilson, but of those, also, who were in charge of the swivel. The parties at the polls had nothing to do with the swivel. George Wilson had nothing to do with it. He was not near it. He had nothing to do with the riot, for that was taking place up above. This was a separate and distinct offence by distinct persons, and for a single purpose. Gentlemen, I not only object to this firing into an innocent crowd, but to such platoon firing in courts of justice. Take your rifles in your hands and shoot a single bullet at the mark. Try your case with the precision that belongs to the law, and don't come here with a scattering fire that is apt to kill at a point that the marksman has not in view.

But there was a riot about the cannon. How was the cannon brought there, and by whom? It is conceded that it was done by a parcel of boys, six, seven, eight, or ten, in number, at the outside. I do not believe anybody puts the number higher of those boys who were in charge of this swivel, which, in all probability, was spiked, so that it could not be fired, especially as it was surrounded by a crowd of citizens who were attempting to arrest them, with the muzzle at one time down the pavement, at another time turned off from the street toward the market-house away from the polls, and away from the Marines. We had in the crowd around it, Mr. Richard Wallach, Mr. Carlisle, and a gallant old general, who, to the misfortune of this community, had not charge of that force that day. We know that that gallant old man pressed his knee upon the muzzle, and kept it there until the Marines got into position to charge upon it.

The parties around this gun said they came there for no purposes of offence, "we come here to attack no one;" but then it was also said we have brought it here to defend ourselves if we are assaulted, or to defend our friends when they are assaulted.

I think that was a lawful and excusable purpose, if such were the real purpose; but it was in a condition in which they could not fire the gun, with a cloth spread over it to protect it from the rain. Now, I am not going to stop to enquire into the exact position of the gun, whether as Hallack said, they attempted to touch it off or not. These discrepancies are inseparable from the case, and are proof of the integrity of the witnesses, rather than a ground for questioning their truth. No two men could come into court and give the same account of that affair. But taking a general view of the testimony, fairly and impartially drawing a conclusion from the whole, you are obliged to say that, up to a considerable time, at least, such was the crowd around that swivel, such its direction, and such its condition, that it was impossible to have used it in a hostile manner against the Marines. Mr. Merrill and Mr. Wallach tell us that with their own hands, while the Marines were drawn up before the polls, they turned its muzzle towards the market-house. There can be no doubt about that. I apprehend, that while some of the most violent were in charge of it, they turned around the gun, and a second and a third time turned it off. General Henderson said that he stood with his knee against the muzzle, his purpose being to arrest the firing of the piece. He did this at the hazard of his own person, both on account of the parties concerned with the gun, and on account of the Marines whom he regarded in some respects as children of his household; and he stood there until the Marines got into a position from which they could charge and take it. Major Tyler supposed that, from the time he first came in sight of this piece, it was turned upon him, and that, as he changed his position, the position of the piece was changed, so as to bear upon him. Certainly this account of the condition of the gun does not tally with the account given by the other witnesses. I do not impute intentional error to that gentleman—no one would be found casting such an imputation upon him; but we all know how liable men are to misconceive facts under circumstances of excitement. Now that, at some period of the transaction, Major Tyler saw that gun turned upon him, I have no doubt, but that it kept turning upon him all the time, and following him up, is disproved. We have a man here, who was with the gun, who turned its muzzle in another direction, who stood around it, and who shows that for a great part of that time, it was impossible for that party to use it, if they desired to do so.

Well, gentlemen, to return to the Marines. I left them, gentlemen, in my argument, standing down at the corner of I street, where they were left by the Mayor. We presently find them moved to a position in Seventh street, opposite to the polls, without any order from the Mayor. My worthy friend, the Captain, was then acting, according to his own words, on his "own hook." He thought I street was the precinct, and finding his mistake, he moved his military band and stationed them in front of the polls, and then proclaimed that the polls were clear. We next find them advancing still higher up Seventh street, brought to the right about and marched to the face of the market-house. Now, it was just about the centre of the market-house that these Navy-yard boys stood with the swivel, numbering in all some six, eight, or ten.

Well now, gentlemen, contemplate the opposing parties. Some half dozen half-grown boys or hobble-de-hoys in possession of an old swivel upon a broken wagon, according to every fair probability spiked, so that it could not be fired, in hostile array upon the one side; some of them, perhaps, with pistols in their pockets. I do not know whether they had or not, but possibly some of them had, and I give them all the advantage of the admission. The array on the one side, then, was this half dozen boys with this old swivel and their pocket pistols: upon the other side, not as my friend said, with banners flying, fifes blowing, and drums beating, but without sound of trumpet or drum, without the flutter of a flag in the breeze, with deadly muskets in their hands—I will excuse the officers of the Marine corps; it was by order of their superiors—with ball cartridges, containing a bullet and three buck-shot each, a hundred and fourteen men in military array—I do not think the exact number was proved on the trial, but the wounded Marine told me that that was the number—with a complement of officers, each with a musket and cartridge-box. I do not know how many cartridges were served out; ten at one time and ten at another. The boys with their pistols and their swivel; the Captain of the Marines, with his one hundred and fourteen armed soldiers; an interval of a short space separated them; each on the same highway—Seventh street. A message came, as was supposed, from the boys, but, as I think it has been proved, from a very different quarter. But a message came, as was supposed at that time, from the party in charge of the cannon, telling the officer in command that unless the Marines were taken from the ground, the cannon would be fired. The half dozen boys sent that message to the one hundred and fourteen Marines! The boys, with the swivel and their pocket pistols, sent that defiance to the Marines, with muskets and ball cartridges, consisting of a bullet and three buckshot! Six to one hundred and fourteen! The gallant officer tells us that he replied to the message, instead of taking away the Marines, he would take the cannon; and immediately, upon his own "hook," he marched his Marines from his position before the polls and drew them up before the cannon; and that he gave the order to march with the purpose of at once firing upon the party as soon as he got into position. Gentlemen, I do not know what your feelings were when that testimony came out: I confess my human sympathies were shocked, that upon a defiance of that nature, from a parcel of headstrong youths and boys, that they would fire a miserable swivel upon one hundred and fourteen armed Marines, the idea could have entered into any man's head, upon that provocation, to fire upon them. Gentlemen, does it not prove how cautious magistrates should be in calling to their aid military power? Does it not prove upon what a dangerous arm the civil authority is made to rest?

That a gentleman of military education, intelligent, experienced, as was the Commander of that corps, could have been so transported by warlike feelings as to think of dealing with those rash boys as he would with a public and an equal enemy! Why, he should have taken the match from that cannon, if they were rash enough to shoot, and not let a man fire a musket. What prevented him from marching up and outflanking the party, and charging with the whole line so as to make their escape impracticable; and what if they had fired; if they had shot through his ranks in revenge for that; was the military thus armed, so superior, to be let loose upon this petty band of boys to commit a murder, (it would be nothing else,) in vengeance. As soon as the swivel was discharged the danger was over; kill what number of Marines it might, the danger was over. I am no military man; I am not accustomed to arms; I am not a man of a military education; I am a civilian; but God forbid that any education should ever make me estimate the course which